BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONALD E. WALLER	)	
Claimant	)	
	)	
VS.	)	
	)	
QUEST CHEROKEE OILFIELD SERVICE	)	
Respondent	)	Docket No. 1,038,547
	)	
AND	)	
	)	
COMMERCE & INDUSTRY INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the August 21, 2009 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The Administrative Law Judge (ALJ) concluded that claimant's injury to his toe and shoulder were the natural and probable result of claimant's original compensable injury. Thus, Dr. Greg Horton was authorized to continue treating claimant.

The respondent requests review of this decision. Respondent disputes the compensability of claimant's injuries to his toe or shoulder alleging that neither injury arose out of and in the course of claimant's employment, nor were they the natural and probable consequence to claimant's original injury. Respondent also argues that even if compensable, the subsequent injuries occurred at a time that respondent was insured by another carrier thus the ALJ exceeded his jurisdiction in ordering Commerce & Industry to pay for those benefits.

Claimant argues that the Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant injured his ankle in a compensable injury on June 16 2007. His treatment includes utilization of crutches and a CAM walker. While returning fr,om wound care in late July or early August 2008, claimant was making his way up the steps to his home when his CAM walker caught on the steps, jamming his toe and causing him to fall striking his shoulder. He sought treatment for his shoulder and toe complaints, but respondent did not voluntarily provide that treatment.

A preliminary hearing was held and an Order was issued on June 18, 2009. In that Order the ALJ concluded that claimant's need for treatment to his toe and his shoulder were the natural and probable consequence of his earlier compensable injury. Thus, respondent and its carrier were ordered to provide treatment with Dr. Horton.

For some inexplicable reason, respondent refused to provide the treatment outlined by Dr. Horton. A second preliminary hearing was held on August 19, 2009. At this hearing respondent argued that claimant's allegations of a subsequent injury were not corroborated by the medical records. And respondent also argued that it had another carrier at the time of the second accident and therefore, respondent's present carrier was no longer on the risk.

After hearing the evidence, the ALJ issued an Order that mirrored his findings in the earlier June 2009 Order and this appeal followed. After considering the evidence contained in the record, this Board Member finds the ALJ's Order should be affirmed.

Following the June 2009 preliminary hearing, the ALJ granted claimant's request for further medical care. In doing so, the ALJ relied on the long-standing rule that every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[1], the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

[1] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*[2], the Court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*[3], the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The District Court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*[4], the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[5]

Here, this Board Member finds this circumstance to be more akin to that found in *Gillig*, rather than *Stockman*. Claimant's original ankle injury had not completely resolved. He was undergoing wound care and was, in fact, on his way home from a treatment session. He had been medicated so as to minimize the pain during the debriding process. The fact that he was wearing a CAM walker, using crutches and under the effects of pain medication makes it understandable that he would fall. The fact that the fall is not recited in the medical records is not as persuasive as respondent believes. The record does not contain the medical records from the emergency room, nor did the nurse case manager,

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[2] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[3] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[4] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[5] *Id.* at 728.

Anita Rhymer, testify and refute claimant's recitation of the events of this fall. Claimant's explanation of the accident is uncontroverted and under these facts and circumstances, at least at this juncture of the proceedings, is persuasive.

In situations such as this, there is often a very fine line between what would be described as a new and separate accidental injury versus a natural consequence of the original injury. In this instance, based upon the record compiled to date, the Board finds that claimant's condition did arise out of his employment with respondent and is a natural consequence of the original injury with respondent. Accordingly, the Board affirms the ALJ's finding that claimant's shoulder and toe injuries are the natural and probable result of the claimant's underlying - and compensable - injury in June 2007.

The carrier also argues it is not liable for the treatment to claimant's toe and shoulder under *Helms*.[6] In essence, respondent maintains that it had no coverage at the time of the subsequent accident. Other than assessing all liability against respondent and Commerce & Industry, the carrier listed on the claim, the ALJ made no findings with respect to this argument. Respondent offered no evidence which would shed light on the dates of coverage and has only offered the bold assertion that it was not on the coverage at the time claimant tripped on the steps coming home from therapy.

The Board has has consistently held that it has no jurisdiction to delve into coverage disputes at this juncture of the claim.[7] Thus, there is no need to comment further on this argument.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[8] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated August 21, 2009, is affirmed

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[6] *Helms v. Tollie Freightways, Inc.*, 20 Kan. App. 2d 548, 889 P.2d 1151 (1995).

[7] See *Madrigal v. Peddlers Inn*, No. 213,277, 1998 WL 599417, (Kan. WCAB Aug. 31, 1998); *Irigoyen v. Moreno's Framing Company*, No. 1,007,684, 2003 WL 21087622, (Kan. WCAB Apr. 30, 2003); *Newberry v. Laforge & Budd Construction Company*, No. 250,386, 2002 WL 433110, (Kan. WCAB Feb. 27, 2002)

[8] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of November 2009.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge